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Supreme Court, U.S.
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No. 04-522

In the Supreme Court of the United States

UNITEDHEALTH GROUP, INC., *et al.*,

Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF EXXON MOBIL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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SUMMARY OF ARGUMENT

The court of appeals' decision sets a dangerous precedent for certifying class actions based on the allegations of the complaint alone, without any rigorous inquiry into whether individual questions will overwhelm the alleged common questions. The court of appeals' decision also deepens existing circuit splits on two substantial and critical questions in class action law: (1) whether courts should certify a class based solely upon the allegations in the complaint or whether courts should conduct a "rigorous" inquiry into the requirements of Rule 23 as described in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), a question upon which there is now a 5-4 split; and (2) whether plaintiffs in a fraud case can satisfy the predominance requirement of a Rule 23(b)(3) action when every plaintiff must individually prove the element of reliance in order to make its case, a question that likewise presents a 5-4 split. The Eleventh Circuit's decision comes down on the wrong side of both of those splits, and therefore creates an excellent vehicle in which this Court may resolve both of those substantial and recurring questions of law.

First, the circuit courts are in conflict over the basic question of whether a court must conduct a "rigorous" inquiry into the factual and legal allegations of the complaint in determining class certification. The court of appeals below, like three other circuit courts, adopted what is, in essence, a pleading standard for class certification, ignoring evidence that individual issues will predominate over the *alleged* common issues. This is flatly contrary to this Court's precedent, which requires that a district court "rigorous[ly]" inquire into whether a plaintiff's claim satisfies the prerequisites of Rule 23. *See Falcon*, 457 U.S. at 161. It is also of utmost significance here, because the court's failure to test the factual allegations of plaintiff's fraud claims resulted in certification of a sprawling RICO class action brought on behalf of all doctors throughout the country against practically the entire managed care industry. *See Klay v.*

Humana, Inc., 382 F.3d 1241, 1246 (11th Cir. 2004) ("This is a case of almost all doctors versus almost all health maintenance organizations."), *petition for cert. filed*, 73 U.S.L.W. 3260 (Oct. 19, 2004) (No. 04-522).

In practice, the court of appeals' pleading standard takes discretion under Rule 23 away from the district court and places it in the hands of the plaintiffs' attorney. The court of appeals' decision invites attorneys to plead their way into class certification, because the factual allegations of the complaint must be accepted as true, even with regard to the facts implicating class certification.

Second, the court of appeals' decision also deepens a square and acknowledged circuit conflict over the question whether plaintiffs in a fraud case can satisfy the predominance requirement of Rule 23(b)(3) when every plaintiff must individually prove reliance. The decision below allows certification of a fraud action based upon the face of the pleadings, even when individual questions of reliance lie at the crux of the case. Although the court of appeals conceded that each of the plaintiffs would have to prove his or her reliance upon the defendants' representations, the court of appeals relieved that burden by holding that the jury could rely upon generalized evidence to find reliance on a classwide basis. By lowering the plaintiff's burden, the court of appeals' decision contravenes this Court's admonition that Rule 23 not modify a plaintiff's substantive cause of action.

The court of appeals' decision threatens to alter the course of class certification law and will lead to certification of unwieldy class actions that are alleged to comply with Rule 23, but in fact do not. Because these cases involve inherently individualized issues, there is no way that they could be tried without substantially abridging defendants' due process and jury rights. Exxon Mobil respectfully submits that it is time for this Court to step in and clarify that mere review of the complaint does not

constitute the rigorous inquiry mandated under this Court's jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION DEEPENS A CIRCUIT SPLIT OVER THE PROPER STANDARD OF INQUIRY INTO THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23.

This Court has made clear that "[t]he class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Falcon*, 457 U.S. at 155 (internal quotation omitted). The use of this exceptional procedure is defined and limited by Rule 23: "[O]f overriding importance, courts must be mindful that the Rule ... sets the requirements that they are bound to enforce.... The text of [the Rule] ... limits judicial inventiveness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Thus, this Court has held both that the merits of an individual claim bear no relevance to whether the claim can be maintained as a class action, *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79 (1974), and that, before certifying a class, a trial court must determine, "after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied." *Falcon*, 457 U.S. at 161.

To satisfy this "rigorous analysis" requirement, the trial court must find "actual, not presumed conformance" with the prerequisites of Rule 23, *id.* at 160. That did not happen here. To the contrary, the court of appeals aligned itself with other circuits that read this Court's holding in *Eisen* to preclude virtually *any* analysis of the factual issues necessary to class certification. Thus, the Second, Ninth, and Tenth Circuits have held that *Eisen*'s prohibition on inquiring into the merits also precludes inquiry beyond the allegations of the complaint and precludes fact finding at the certification stage. *See* Pet. 15-17

(discussing cases).[2] On the other side of the split, the First, Third, Fourth, Fifth, and Seventh Circuits have faithfully reconciled *Eisen* and *Falcon*, *see* Pet. 13-15 (discussing cases):[3] *Eisen* bars a court from putting a thumb on the scales of certification for meritorious claims, or a thumb on the scales of decertification for frivolous claims. What *Eisen* does not prohibit is what *Falcon* requires: that a court fulfill its obligations under Rule 23 to rigorously inquire whether the plaintiff has satisfied the requirements for a class action.

The divide in the circuits goes beyond mode of analysis. The court of appeals' failure to conduct a rigorous certification inquiry was outcome dispositive here, as it will be for almost any cleverly pleaded fraud claim. Had the court of appeals below applied *Falcon* and tested the plaintiffs' allegations, instead of adopting them, the class could not have been certified in the face of defendants' evidence that individual issues overwhelm any alleged common ones.

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[2] *See, e.g.*, *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir. 1975).

[3] *See, e.g.*, *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (3d Cir. 2001); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000).

A. This Court Has Precluded Inquiry Into The Substantive Merits Of A Complaint But Required A Rigorous Inquiry Into Whether The Plaintiff's Claim Is Maintainable As A Class Action Under Rule 23.

In *Eisen*, this Court found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. The district court there had held a hearing on the merits of the case in order to determine whether the *defendants* should bear the costs of providing notice to potential class members. *See id.* Because the "petitioner was 'more than likely' to prevail on his claims," the district court imposed 90% of the notice costs on the defendants, thus "allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it," *i.e.*, the requirements of notice and manageability. *Id.*

This Court rejected the district court's analogy between a class action and a preliminary injunction. *See id.* at 168. The question in determining the propriety of a class action is whether the requirements of Rule 23 are met, not whether the plaintiff is likely to prevail on the merits. By refusing to pay the costs of notice, the plaintiff had failed to satisfy the requirements of maintaining a class action, and the Court ordered the class action dismissed. *Id.* at 179.

Eisen itself thus makes clear that the plaintiff bears the burden of satisfying the requirements of Rule 23. Nothing in the Court's opinion, however, precludes a court from testing the plaintiff's allegations insofar as they bear upon whether the plaintiffs can satisfy the strictures of Rule 23, *e.g.*, whether the class is sufficiently numerous, Fed. R. Civ. P. 23(a)(1), whether the plaintiffs have alleged common questions of law and fact, *id.* 23(a)(2), whether plaintiffs can demonstrate that common

questions predominate over individualized ones, *id.* 23(b)(3), and the like.

Were there any room for doubt upon this point, this Court's subsequent decision in *Falcon* made this point perfectly clear:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his *otherwise unsupported allegation* that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

457 U.S. at 157 (emphasis added). Thus, the Court held that a court can separate the merits of an individual's claim from the class certification decision, because the requirements of the class action turn on manifestly different standards. Rule 23 is not concerned with the likelihood that either the individual's or the class's claims will succeed. Therefore, evidence that a claim is meritorious, like that considered by the *Eisen* district court, does not "necessarily justify the additional inferences" that the claim is typical, pervasive, or common to a class. *Falcon*, 457 U.S. at 158.

Reversing the district court, the *Falcon* Court observed that the plaintiff had relied upon different evidentiary approaches in attempting to prove his individual and class discrimination claims. *See id.* at 159. This was far from efficient and was directly attributable to the district court's "failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Id.* at 160. The Court recognized that certification considerations "are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" but nonetheless held that a court

must "probe behind the pleadings" to determine whether the requirements of Rule 23 are met. *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). "[A]ctual, not presumed, conformance with Rule 23" is "indispensable." *Id.*

Falcon and *Eisen* thus create two rules: (1) the merits of a plaintiff's individual claim have no bearing on whether the claim is maintainable as a class action, and (2) a trial court must go beyond the pleadings and conduct a "rigorous analysis" to determine whether the plaintiff has satisfied the requirements of Rule 23. Both reinforce the fundamental principle that the requirements of Rule 23 must be satisfied in order to maintain a class action. And only if a court rigorously enforces Rule 23 will the class action rule serve its intended objectives.

B. A "Pleading Standard" For Certification Creates An Unwarranted Conflict Between This Court's Decisions In *Eisen* And *Falcon*.

The court of appeals upheld certification of this sprawling RICO class action only by accepting plaintiff's allegations as true. This pleading standard, which is now applied in four circuits, *see supra* note 2, requires that a court ignore evidence demonstrating that individual issues overwhelm plaintiffs' claims, merely because that evidence contradicts the conclusory factual allegations of the complaint. Here, plaintiffs alleged claims on behalf of every physician who has treated any health care patient who is a member of any health care plan insured by any of the defendant managed care companies. Individual issues exist (not surprisingly) in such a sprawling action, because managed care companies have entered into hundreds of thousands of contracts with physicians nationwide, and those contracts vary significantly on material payment terms, including the applicable state law. *See* Pet. 6 & n.5. Defendants' evidence demonstrated that individual doctors relied upon the payment terms in their own contracts with the managed care companies and did not rely upon generalized

representations that they would be paid pursuant to a different reimbursement policy, as the complaint alleged. *See id.* at 7.

The court of appeals nonetheless held that common questions predominate based on the allegations in the complaint. The plaintiffs alleged that defendants conspired to underpay doctors nationwide, *see Klay*, 382 F.3d at 1256. ("[A]ll of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs."), and that defendants made the same misrepresentations about reimbursement policies to all physicians, *see id.* at 1259 ("The alleged misrepresentations in the instant case are simply that the defendants repeatedly claimed they would reimburse the plaintiffs for medically necessary services they provide to the defendants' insureds...."). In fact, the physician contracts contained materially different payment terms and defendants made *different* representations to physicians nationwide, as defendants' evidence demonstrated. The court of appeals simply ignored that evidence in favor of generic, overbroad allegations that all defendants represented to all physicians at all times that they "would honestly pay physicians the amounts to which they were entitled." *Id.* at 1258.

This is a far cry from the "rigorous analysis" this Court held was essential in ensuring that the prerequisites of Rule 23 are satisfied. Assuming the validity of a complaint's factual allegations may be appropriate to a Rule 12(b)(6) motion to dismiss, but it is not appropriate on a certification determination that is normally the district court's last word on the subject. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (Easterbrook, J.). A judge must conduct the inquiries identified in Rule 23 in order to exercise proper discretion. *Eisen* requires that the court assume the merits of the claim, but it does not require that a court assume the commonality or typicality of claims. And *Falcon* squarely prohibits such assumptions.

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Eleventh Circuit's decision violates this Court's precedent and the Rules Enabling Act, and creates an additional reason for this Court's intervention in the case.

A. By Modifying the Plaintiff's Burden, The Court Of Appeals' Decision Violates The Rules Enabling Act.

In its zeal to affirm certification of the class action below, the court of appeals modified the substance of plaintiff's underlying cause of action, and in so doing, contravened this Court's precedents. The Eleventh Circuit recognized that established precedent requires each plaintiff individually to prove reliance, but the court nonetheless held that class members could evade that requirement based upon a presumption of reliance. The Rules Enabling Act prohibits federal courts from modifying the substantive cause of action to achieve class certification, however.

This Court has emphasized, time and again, that Federal Rule of Civil Procedure 23 is a procedural device that may not modify a plaintiff's underlying substantive cause of action. The Rules Enabling Act requires that the civil rules "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The statute "underscores the need for caution" so as to ensure that judicial interpretation of Rule 23 does not "ignore the Act's mandate." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999); *see also Amchem*, 521 U.S. at 613 (same). A court may not alter the elements of a plaintiff's cause of action so as to fit the underlying action into the procedural confines of Rule 23. The Eleventh Circuit, however, committed this precise error: in one breath, it recognized plaintiffs' need to prove individualized reliance and in another absolved them of that requirement so as to permit common elements to predominate under the class.

It is well established that where, as here, a civil RICO claim is predicated upon mail or wire fraud, the plaintiffs must

demonstrate reliance like any other fraud plaintiff. The RICO statute provides a civil remedy only to those persons who are injured "by reason of" racketeering activity. 18 U.S.C. § 1964(c). A civil RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Therefore, as the Eleventh Circuit itself held, "reliance may not be presumed in fraud-based RICO actions; instead, the evidence must demonstrate that each individual plaintiff actually relied upon the misrepresentations at issue." *Klay*, 382 F.3d at 1257.

The Eleventh Circuit held that "reliance may not be presumed" in this case, but it nonetheless licensed the jury to make such a presumption on behalf of the tens of thousands of doctors who would make up the putative class. *Id.* at 1259 ("A jury could quite reasonably infer that guarantees concerning physician pay ... go to the heart of these agreements, and that doctors [i.e., all the doctors] based their assent upon them."). This case involves more than half a dozen separate defendants, charged with making numerous different statements to the thousands of members of the class throughout the country. The court held, however, that plaintiffs had no obligation to demonstrate that a single plaintiff actually relied upon a single misstatement made by a single defendant. Rather, the court held, the jury might infer that every class member relied upon the defendants' statements, because the statements all "conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." *Klay*, 382 F.3d at 1258. By holding that a jury could presume that every class member relied upon the defendants' statements, the Eleventh Circuit relieved the plaintiffs of their burden to demonstrate actual reliance. In so doing, the court enlarged and modified plaintiffs' statutory rights under the guise of class certification. This is contrary to *Ortiz* and *Amchem*, and the Rules Enabling Act.

B. This Court's Intervention Is Necessary To Prevent Plaintiffs From Forum-Shopping Multi-State Class Actions To The Most Lax Judicial Circuits.

The court of appeals' decision is not only mistaken, but it also deepens an established split among the circuits that is ripe for this Court's resolution. Because plaintiffs increasingly rely upon the class action rule to adjudicate actions involving plaintiffs and defendants from multiple States, there is a corresponding need for nationwide uniformity with respect to the basic requirements of Rule 23. Otherwise, plaintiffs may forum shop at will so as to select the circuit with the most lax class certification rules in an effort to force the defendants to settle or else defend against an unwieldy class action overwhelmed by individual questions.

As the Eleventh Circuit observed, the plaintiffs in this case seek to resolve, through one civil action, a purported dispute between all doctors and all health maintenance organizations throughout the country. *Klay*, 382 F.3d at 1246 ("This is a case of almost all doctors versus almost all health maintenance organizations."). Although plaintiffs brought this action in the Southern District of Florida, they could have just as easily brought the case in virtually any federal district court throughout the United States.

It is no surprise that the plaintiffs did not bring this action in a district court within the Second, Fourth, Sixth or Eighth Circuit. In those circuits, the requirement that civil RICO plaintiffs demonstrate reliance on an individualized basis would have been outcome-determinative of plaintiffs' class action motion. The Eleventh Circuit has now joined three others in lowering the threshold for class actions arising out of fraud claims by affirmatively modifying the underlying cause of action. The decision below deepens the existing division among the circuits and expands the opportunities for forum-shopping plaintiffs.

The nationwide impact of class certifications makes this continuing conflict intolerable. Because plaintiffs have almost plenary discretion to choose the federal circuit in which to litigate the cause of action, the continuing split between the circuits over the availability of fraud claims means that defendants who operate throughout the country will basically be held hostage to the lower, and erroneous standards, of those who favor class actions. This Court's intervention is warranted.

CONCLUSION

This Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument.

Respectfully submitted,

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